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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Protecting human rights and fundamental freedoms while countering terrorism

Report of the Secretary-General**

Summary

The present report is submitted pursuant to General Assembly resolution 61/171, in which the Assembly reaffirmed that any measure taken to combat terrorism must comply with States' obligations under international law, in particular human rights, refugee and humanitarian law. The report provides an overview of the recent developments within the United Nations system regarding the protection of human rights and fundamental freedoms while countering terrorism, highlighting the adoption of the United Nations Global Counter-Terrorism Strategy, including its plan of action, as an important document which considers respect for human rights and the rule of law to be the fundamental basis of the fight against terrorism. It also includes the activities of the United Nations High Commissioner for Human Rights, the human rights treaty bodies, the Human Rights Council and its special procedures mandates and reports on concerns regarding a number of issues, including judicial scrutiny of counter-terrorism measures, the transfer of individuals suspected of terrorist activity and secret detention.

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** The present report was submitted after the deadline in order to reflect the most up-to-date information possible.

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I. Introduction

1. The present report responds to the request contained in General Assembly resolution 61/171 that the Secretary-General report on the implementation of the resolution to the Assembly at its sixty-second session. The two previous reports of the Secretary-General are contained in documents A/61/353 and A/60/374. The present report also responds to the request of the Human Rights Council in its decision 2/102[1] that the Secretary-General and the United Nations High Commissioner for Human Rights continue with the fulfilment of their activities in accordance with all previous decisions adopted by the Commission on human rights.

II. Recent developments in the United Nations in the area of human rights and counter-terrorism

2. This section includes an overview of the United Nations Global Counter-Terrorism Strategy, which is comprised of General Assembly resolution 60/288 and its annex, the plan of action and a summary of the relevant activities of the Counter-Terrorism Committee of the Security Council, the Human Rights Council and its special procedures and human rights treaty bodies in the field of human rights while countering terrorism.

United Nations Global Counter-Terrorism Strategy

3. The General Assembly adopted the United Nations Global Counter-Terrorism Strategy following the adoption of the 2005 World Summit Outcome (resolution 60/1) and the submission of the Secretary-General's report entitled "Uniting against terrorism: recommendations for a global counter-terrorism strategy" (A/60/825 and Corr.1). Member States agreed on a coordinated and comprehensive response to terrorism at the national, regional and global levels based on respect for human rights and the rule of law, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy and recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals but complementary and mutually reinforcing (see sect. IV below).

4. In the Global Counter-Terrorism Strategy, Member States resolved to consistently, unequivocally and strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security. At the same time, Member States resolved to take urgent action to prevent and combat terrorism, in particular by considering becoming parties to the existing international conventions and protocols against terrorism, implementing them, and making every effort to reach an agreement on and conclude a comprehensive convention on international terrorism; by implementing all General Assembly resolutions on measures to eliminate international terrorism and relevant resolutions on the protection of human rights and fundamental freedoms while countering terrorism, and by implementing all Security Council resolutions related to international terrorism and to cooperate fully with the counter-terrorism subsidiary bodies of the

[1] See A/HRC/2/19, chap. I, sect. B.

Security Council in the fulfilment of their tasks. They also recognized that international cooperation and any measure taken to prevent and combat terrorism must comply with States' obligations under international law, including the Charter of the United Nations, and relevant international conventions and protocols, in particular international human rights, refugee and humanitarian law.

5. The plan of action provides a number of concrete measures which must be taken by Member States individually and collectively:

(1) To address the conditions conducive to the spread of terrorism;

(2) To prevent and combat terrorism, as well as to build States' capacity to do so and strengthen the role of the United Nations in this regard;

(3) To ensure respect for human rights for all and for the rule of law as the fundamental basis of the fight against terrorism.

6. Member States also welcomed the intention of the Secretary-General to institutionalize the Counter-Terrorism Implementation Task Force within the Secretariat in order to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system. The Task Force established by the Secretary-General currently has 24 members, including the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. A number of working groups have been established which deal, inter alia, with human rights aspects of the strategy.

7. OHCHR contributes to the Task Force by leading the working group on protecting human rights while countering terrorism. The objective of the working group is to support efforts by Member States to ensure the promotion and protection of human rights in the context of counter-terrorism, including through the development of and implementation of human rights-compliant legislation and policies. It has been agreed by the Task Force that the working group would assess the support and assistance currently given to Member States to ensure the promotion and protection of human rights in the context of counter-terrorism; identify gaps and weaknesses and develop proposals for strengthening support to Member States; facilitate an exchange of information on priority human rights concerns, as well as "good practice" examples on the protection of human rights in the context of counter-terrorism, drawing on experiences at the national and regional levels; and provide guidance, including by developing tools, to assist Member States in strengthening the protection of human rights in the context of counter-terrorism. Other members of the working group include the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the United Nations Office on Drugs and Crime, the Counter-Terrorism Executive Directorate, the Office of Legal Affairs of the Secretariat, the United Nations Interregional Crime and Justice Research Institute, the World Bank and the International Maritime Organization (IMO). OHCHR also participates in a number of other working groups, including those on facilitating the integrated implementation of the United Nations Global Counter-Terrorism Strategy and on supporting and highlighting victims of terrorism.

Counter-Terrorism Committee

8. In its comprehensive report of 16 December 2005 (S/2005/800, annex), which was endorsed by the Security Council (see S/PRST/2005/64), the United Nations Counter-Terrorism Committee reiterated that States must ensure that any measure taken to combat terrorism should comply with all their obligations under international law and that they should adopt such measures in accordance with international law, in particular human rights law, refugee law and humanitarian law. It also stressed that the Counter-Terrorism Committee Executive Directorate should take this into account in the course of its activities. The Counter-Terrorism Committee and the Executive Directorate have routinely referred to relevant considerations in this regard since that time, in their analysis of States' implementation of Security Council resolutions 1373 (2001) and 1624 (2005), as well as in their correspondence with States and in the course of country visits. The Committee has also been briefed on two occasions by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, most recently on 26 October 2006. There continues to be regular liaison between the Committee, the Executive Directorate and OHCHR as well as other human rights organizations, including regional organizations, in matters relating to counter-terrorism.

Human Rights Council

9. At its second session, the Human Rights Council adopted decision 2/112[2] on persons deprived of liberty in the context of counter-terrorism measures in which the Council urged "all States to take all necessary steps to ensure that persons deprived of liberty, regardless of the place of arrest or of detention, benefit from the guarantees to which they are entitled to under international law, including, inter alia, protection against torture, cruel, inhuman or degrading treatment or punishment, protection against refoulement, the review of their detention and, if subjected to trial, fundamental judicial guarantees".

Special procedures of the Human Rights Council

10. During the reporting period, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has continued to address concerns related to the fight against terrorism. In addition, a number of other special procedures mandate holders have addressed a broad range of issues related to the impact of terrorism on human rights. They have done so by sending urgent appeal letters, issuing press releases, preparing thematic studies and conducting country visits, within the context of their mandates and with due consideration to the mandate of the Special Rapporteur, which includes working in close coordination with other special procedures mandate holders. Following are examples of these mandate holders' recent activities and main areas of concern with respect to human rights and counter-terrorism, as reported by them to the General Assembly and the Human Rights Council and in a number of press releases.

11. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism presented his annual reports to the General Assembly (A/61/267) in November 2006 and to the Human Rights Council

[2] Ibid.

(A/HRC/4/26 and Add.1-3) in March 2007. In these reports, the Special Rapporteur focused on a number of thematic issues of special interest to his mandate. First, he addressed the issue of the rights to freedom of assembly and association in the context of counter-terrorism measures. The Special Rapporteur examined possible limitations to and derogations from these rights, including the necessary conditions for the proscription of an alleged terrorist group as well as the listing of groups on so-called "terrorist lists" by the Security Council, regional organizations and States. Second, the Special Rapporteur focused on the compliance of "terrorist profiling" practices with international human rights standards, set out permissible forms of terrorist profiling as well as alternatives to the reliance on terrorist profiles. He also examined the issue of suicide attacks as a specific form of terrorism, by providing a survey of the existing research and analysis on this phenomenon. The Special Rapporteur further addressed the issue of "shoot-to-kill" and existing international standards on the use of firearms by law enforcement officials.

12. During the reporting period, the Special Rapporteur also undertook two country visits. From 16 to 26 April 2007, the Special Rapporteur visited South Africa. In the press release issued following his visit, the Special Rapporteur explained that the purpose of the visit was to examine South Africa's laws, policies and practices on counter-terrorism and to assess how such measures affected the protection and promotion of human rights and to examine the role played by South Africa in the issue of counter-terrorism in the subregional, regional and international context. The Special Rapporteur focused on the definition of terrorism, the protection of freedom of expression, the nature and scope of parliamentary action against persons listed by the Security Council and the rights of foreigners in the context of their arrest and detention for alleged security concerns or for having overstepped immigration rules.

13. From 16 to 25 May 2007, the Special Rapporteur visited the United States of America. In his press release issued on 25 May, he explained that the objective of the visit was to undertake a fact-finding exercise and a legal assessment of United States law and practice in the fight against terrorism, measured against international law. His visit was also aimed at identifying and disseminating best practice in countering terrorism. The Special Rapporteur focused on the public international law framework, including the application of international human rights law during armed conflict and the extraterritorial application of international human rights law. He also examined a number of issues surrounding the judicial guarantees which must be afforded to individuals suspected of terrorist activity as well as the transfer of terrorist suspects. Finally, he addressed the issues of the definition of terrorism, profiling, community outreach and immigration and refugee status. The Special Rapporteur also examined the impact of surveillance on the right to privacy. Reports on these country visits will be submitted to the Human Rights Council at one of its future sessions.

14. The Special Rapporteur also held a number of meetings, including with the European Parliament, national parliaments of States members of the European Union and the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners. He also met with the Counter-Terrorism Committee, as indicated earlier, and the Executive Directorate, as well as with the Chair of the Task Force and the coordinator of the Analytical Support and Sanctions Monitoring Team. Finally, with the aim of ensuring a coordinated and collaborative approach, the Special

Rapporteur held meetings with OHCHR officials responsible for other thematic mandates, in particular to ensure complementarity with the mandate of the High Commissioner for Human Rights.

15. The report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment following his visit to Jordan (A/HRC/4/33/Add.3) was examined by the Human Rights Council in the course of the reporting period. The Special Rapporteur examined the issue of torture aimed at extracting confessions and obtaining intelligence in pursuit of counter-terrorism and national security objectives as well as the issue of transfer of individuals suspected of terrorist activities ("extraordinary renditions"). In his annual report to the Human Rights Council (A/HRC/4/33), the Special Rapporteur re-emphasized the absolute prohibition of torture. He recalled the importance of States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishing universal jurisdiction in accordance with the principle aut dedere aut iudicare by highlighting that universal jurisdiction is one of the most important means of fighting impunity because it ensures that there are no safe havens for perpetrators of torture.

16. The Special Rapporteur on freedom of religion or belief, in her annual report to the Human Rights Council (A/HRC/4/21 and Add.1), noted that she had received numerous allegations that national counter-terrorism measures adopted in the post-11 September 2001 context have had, and continue to have, adverse effects on the enjoyment of freedom of religion or belief worldwide. She stressed that on many occasions, members of groups perceived to hold extreme religious views have been harassed, arrested or deported. The Special Rapporteur expressed concern that some counter-terrorism measures may undermine respect for freedom of religion or belief. In particular, she reiterated the concern expressed by other mandate holders that the application of definitions of terrorism may be used to outlaw peaceful religious entities or to blacklist entire communities and religions, subjecting them to systematic suspicion, and recommended that States refocus their efforts on the origins of terrorism and on the need to ensure protection and promotion of human rights without bias or selectivity.

17. Issues related to the international transfer of individuals in the context of counter-terrorism are examined in the annual report of the Working Group on Arbitrary Detention to the Human Rights Council for 2006 (A/HRC/4/40 and Add.1-5). The Working Group stated that the practice of "renditions" is irremediably in conflict with the requirements of international law. Specifically, the Working Group explained that when a Government eludes procedural safeguards, in particular the right of an affected person to be heard, that Government cannot in good faith claim that it has taken reasonable steps to protect the individual's rights after removal, including the right not to be arbitrarily detained, and will, consequently, share responsibility with the receiving State for the ensuing arbitrary detention. The Working Group also stressed that anti-terrorism conventions do not contemplate either prolonged administrative detention as an alternative to criminal justice, nor do they envisage "renditions" as an alternative to the guarantees of extradition proceedings. The Working Group recalled the preference for criminal justice and extradition proceedings as instruments to hold perpetrators of terrorist acts. Where this is not possible, States may under international law deport or expel non-citizens from their territory if they represent a threat to national security, provided a number of procedural guarantees are respected. The opportunity to

challenge one's removal is essential to uphold the principle of non-refoulement. The Working Group further argued that the principle of non-refoulement should not only apply to cases where there is a risk of extrajudicial killings or torture, but should extend to cases where there is a substantial risk of arbitrary detention. The Working Group noted that the practice of obtaining diplomatic assurances from the receiving State to circumvent the non-refoulement principle may be acceptable for detention and fair trial, only if a number of stringent conditions, detailed in the Working Group's report, are fulfilled. Finally, the Working Group referred to so-called "reverse diplomatic assurances", which are sought by the sending Government to ensure that a person transferred will be deprived of liberty, even in the absence of criminal charges or other legal basis for detention. The Working Group concluded that these assurances constitute a serious violation of international law and urged Governments to refuse to give them unless they can be given in accordance with domestic legislation and international human rights law (see A/HRC/4/40).

18. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance noted with concern the rise of racism and intolerance towards certain communities, in particular Arab and Muslim communities, in the wake of the events of 11 September 2001. In his reports, the Special Rapporteur reflected on various issues, including racial profiling, and reminded States that issues related to immigration, asylum and the situation of foreigners should be dealt with on the basis of the pertinent international instruments and not only on the basis of the security dimension and the fight against terrorism (see A/HRC/4/19/Add.3 and A/HRC/4/19/Add.4).

19. Mandate holders have addressed issues related to human rights and counter-terrorism in a number of communications to Member States raising specific cases of concern. By way of example, the Special Rapporteur on extrajudicial, summary or arbitrary executions dealt with aspects of killings in the context of alleged counter-terrorism operations, including "targeted killings" and "crossfire" killings, reiterating his concern that these place no verifiable obligation upon States to demonstrate that those against whom lethal force is used are indeed terrorists or to demonstrate that every other alternative has been exhausted (see A/HRC/4/20/Add.1). The Working Group on Enforced or Involuntary Disappearances focused its attention on the practice of "rendition" or "extraordinary rendition" and stated that because the persons subjected to this practice are generally held incommunicado in secret facilities, it is believed that the practice may amount to enforced disappearance and may violate the right to freedom from arbitrary arrest and detention and the right to judicial review of the basis of detention (see A/HRC/4/41).

Human rights treaty bodies

20. The United Nations human rights treaty bodies have continued to take up issues related to terrorism in their examinations of States parties' reports and individual complaints. In particular, the contours of the absolute prohibition of refoulement in the context of the use of diplomatic assurances as well as issues of responsibility of a State party for acts taking place outside its territory or by foreign agents in its territory have been examined by the Human Rights Committee and by the Committee against Torture.

21. In the case of *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), the Human Rights Committee provided important guidance on a number of issues, including the use of diplomatic assurances to remove an individual in cases where a real risk of ill-treatment exists, as well as on the issue of State responsibility in cases of ill-treatment carried out by foreign officials and on the obligation of a State to carry out effective investigations of any allegations of ill-treatment. Specifically, the case dealt with the expulsion to Egypt by Sweden on security grounds of Mohammed Alzery, an Egyptian national, despite the fact that the Swedish authorities had found that, if returned, there was a risk that he would be ill-treated and that his expulsion would therefore be inconsistent with Sweden's human rights obligations. In the process of his expulsion, Mr. Alzery was handed over by Swedish authorities to foreign agents at a Swedish airport. The Swedish Parliamentary Ombudsman subsequently qualified the treatment Mr. Alzery suffered at the hands of the foreign agents as "inhuman". In the examination of the issue of diplomatic assurances, the Human Rights Committee followed the analysis of the Committee against Torture in the companion case of *Agiza v. Sweden* (CAT/C/34/D/233/2003). The Human Rights Committee noted that to reduce the risk of ill-treatment at the hands of Egyptian authorities, and thereby to avoid a breach of its obligation of non-refoulement, Sweden had relied solely on the diplomatic assurances provided by the Egyptian authorities that the individual would not be tortured and that he would be given a fair trial. In light of the fact, inter alia, that the assurances contained no mechanism to ensure their enforcement, that there was no provision for their effective implementation, and that the visits to the place of detention failed to conform to international standards of good practice, including private access to detainees and medical and forensic expertise, the Committee concluded that the diplomatic assurances were insufficient to protect against the risk of ill-treatment and that as a result, the expulsion amounted to a breach of article 7 of the International Covenant on Civil and Political Rights.

22. In the same case, examining the issue of State responsibility, the Human Rights Committee noted that, at a minimum, a State party is responsible for foreign officials exercising acts of sovereignty on its territory, if such acts are performed with the consent or acquiescence of the State party. In addition, the Committee highlighted the obligation of States parties to ensure that their investigative apparatus has the capacity to investigate, as far as possible, the criminal responsibility of all relevant domestic and foreign officials for conduct in breach of article 7 of the Covenant and to bring the appropriate charges. Failure to do so would amount to a violation of a State's obligations under article 7 combined with article 2 of the Covenant.

23. The Committee against Torture further examined the issue of diplomatic assurances and that of the responsibility of States for acts taking place outside their territory in the case of *Pelit v. Azerbaijan* (CAT/C/38/D/281/2005). The Committee against Torture confirmed its reasoning on the issue of the use of diplomatic assurances in cases of removal where there exists a risk of mistreatment. The complainant, a Turkish national with refugee status in Germany, had been convicted in absentia of involvement in subversive activities linked to the PKK (Communist Party of Kurdistan) in Turkey. She was arrested in Azerbaijan, where a decision to extradite her to Turkey was made, based on the provision of assurances from the Turkish authorities regarding her treatment after her extradition. The interim measures requested by the Committee had been disregarded by the Azerbaijani

authorities and she was extradited to Turkey. The Committee stated that the Azerbaijani authorities had not shown why they did not recognize Ms. Pelit's refugee status, despite the fact that the general situation of persons such as the complainant and the complainant's own past raised real issues under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee further found a breach of article 3 of the Convention, even though the Azerbaijani authorities claimed that their embassy in Turkey had been monitoring Ms. Pelit's post-return treatment and that Ms. Pelit had confirmed in a private conversation with a representative of the embassy, that she had not been tortured or ill-treated. The Committee found that the State party had not provided sufficient information to show that the post-return monitoring mechanisms or the steps that it took were objective, impartial and sufficiently trustworthy, both in fact and in the perception of the complainant.

24. The Committee against Torture also addressed the issue of responsibility of a State party for the transfer of detainees by a Member State's military forces taking place outside the State's territory. The Committee recalled that article 3 of the Convention and its obligation of non-refoulement apply to a State party's military forces, wherever situated, where they exercise effective control over an individual, even where the State party's forces are subject to the operational command of another State. The Committee thus concluded that any transfer of detainees within a State party's effective custody to the custody of any other States must comply fully with article 3 of the Convention (see CAT/C/DNK/CO/5).

III. Activities of the United Nations High Commissioner for Human Rights

25. The United Nations High Commissioner for Human Rights has continued to examine the question of the protection of human rights and fundamental freedoms while countering terrorism and to make general recommendations about the obligations of States in this regard. In her dialogue with States in particular, she has reiterated her serious concern about a number of legislative measures adopted by, and practices of, States in the name of countering terrorism, which have the effect of deeply affecting the rule of law and the sustainable success of the fight against terrorism, in line with human rights treaties, in particular the International Covenant on Civil and Political Rights and the Convention against Torture.

Judicial scrutiny of counter-terrorism measures

26. The High Commissioner has voiced her concern regarding the absence of transparency that may prevail in the investigation and trial of terrorism-related cases. Some States have adopted or revived State secret or immunity doctrines, used evidence and information the origin of which is not disclosed, or taken other measures to shield intelligence, military or diplomatic sources and information, in the name of national security interests. These measures all have the deleterious effect of limiting access to information necessary for the prompt, thorough and effective investigation and prosecution of terrorism-related cases. They also undermine the credibility and public perception of the integrity of the outcomes of investigations and trials, and shield important issues from full public debate and accountability in democratic institutions.

27. The High Commissioner has stressed the importance of ensuring that there is effective judicial control over qualifications by the executive branch that certain information may not be disclosed in order to protect national interests, notably security interests. Where such control is lacking, it suggests undue judicial deference to the executive regarding key principles of access to justice, the right to an effective remedy, access to courts and the right to a fair trial. Moreover, it is inappropriate that secrecy and immunity doctrines should be advanced in cases where serious human rights violations may have occurred and need to be investigated with a view to identifying those responsible and ensuring full accountability. The High Commissioner has noted that a number of carefully and narrowly tailored measures may be considered by States for use in appropriate circumstances, for example, the use of special or security clearance of counsels and in camera hearings, in order to safeguard legitimate interests. The use of appropriate devices in carefully justified circumstances requiring restrictive treatment of certain information can help to preserve various interests of the individual in obtaining due process or satisfaction, where applicable, the interest of society in shedding light on the measures adopted by the State in countering terrorism, the interest of the integrity of the judicial process and the interest of the State in effectively countering terrorism.

28. The High Commissioner has reiterated the importance of all measures adopted to counter terrorism being subject to effective judicial review to ensure their conformity with human rights law, in particular their legality, necessity and proportionality. The High Commissioner has welcomed the transparency and the contribution to a full and informed public and institutional debate that have been brought by a number of national and regional rulings and inquiries.[3] These show clearly that there is no inherent conflict between effective counter-terrorism measures and an independent, impartial and effective judicial review of those measures, aiming to ensure both the legality of the measures under human rights law and the right of individuals and societies to investigations and appropriate remedies. On the contrary, appropriate judicial review strengthens the durability and sustainability of counter-terrorism measures.

Transfer of individuals suspected of terrorist activity and secret detention

29. Throughout the reporting period, the High Commissioner has continued to highlight the serious challenge to human rights posed by the return, expulsion, deportation, extradition or transfer, in ways inconsistent with international human rights law, of individuals suspected of terrorist activities. Such transfers raise risks of violations of the rights to liberty and security of the person, the prohibition of

[3] See, inter alia, Council of Europe, Committee on Legal Affairs and Human Rights, secret detentions and illegal transfers of detainees involving Council of Europe member States ("Marty Reports"), AS/Jur(2006)16 and AS/Jur(2007)36; "Follow-up to the Secretary-General's reports under article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies (SG/Inf(2006)5 and SG/Inf(2006)13): proposals made by the Secretary-General, 30 June 2006" document SG(2006)01; Supreme Court of Canada, *Adil Charkaoui, Hassan Almrei and Mohamed Harkat v Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness*, 23 February 2007; Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, report of the events related to Maher Arar, 2006; United Kingdom Special Immigration Appeals Commission, for example: *DD and AS v. The Secretary of State for the Home Department*, 27 April 2007.

torture and other cruel, inhuman or degrading treatment or punishment, the right to recognition everywhere as a person before the law, the right to a fair trial, the right to private and family life and the right to an effective remedy. They may also qualify as an enforced disappearance. The High Commissioner recalled that any transfer of an individual must respect the rule of law, including the right to respect for a person's inherent dignity and due process.

30. In her report to the Human Rights Council (A/HRC/4/88), the High Commissioner addressed an issue which has also been addressed by a number of special procedures mandate holders, that of the well-established principle in international law of non-refoulement. This principle provides that where there is a real risk of torture or other cruel, inhuman or degrading treatment or punishment in a receiving State, the prohibition of refoulement is absolute and may not be subject to any limitations or derogations. She has repeatedly voiced her concern regarding the use of diplomatic assurances, memorandums of understanding and other diplomatic agreements regarding the transfer of individuals suspected of terrorist activity as practices that are inappropriate, ineffective, and undermine the absolute prohibition against refoulement. She has thus welcomed an increasing number of national cases where courts or other bodies have opposed the return of individuals based on an assessment that the diplomatic assurances were considered unreliable or insufficient to limit the risk of torture, ill-treatment or other serious human rights violations.[4]

31. The High Commissioner further recalled that all States have a positive obligation to ensure that their territory is not used to transfer persons to places where they are likely to be subjected to torture. This includes an obligation to effectively inquire whether the movements of foreign States or agents of a State on or through its territory may involve such practices, where there are grounds to so believe. Assisting other States in the commission of these wrongful acts or failing to take protective measures may engage a State's responsibility for any ensuing human rights violations. In a speech to the Parliamentary Assembly of the Council of Europe in April 2007, the High Commissioner commended the laudable steps taken in European regional systems to investigate reports of serious human rights violations, notably secret detentions and unlawful inter-State transfers. She welcomed the ad hoc inquiries that have taken place within the Council of Europe and the European Union and strongly supported the recommendations made by those bodies. She further encouraged States to carry out appropriate national inquiries.

32. The High Commissioner has also raised the issue of judicial review of lawfulness of detention a number of times. She has recalled that, while a State may lawfully detain a person suspected of terrorist activity, scrupulous compliance with human rights law related to liberty and security of persons, the right to recognition before the law and the right to due process are essential. This includes a right to review of detention in a court without delay, so the court may decide on the

[4] See United Kingdom Special Immigration Appeals Commission, *DD and AS v. The Secretary of State for the Home Department*, 27 April 2007; Committee Against Torture, conclusions and recommendations, the Netherlands (CAT/C/NET/CO/4), para. 3 (h). During the examination of the report, the delegation of the Netherlands stated that the Government had never relied on diplomatic assurances to ensure that a person sent back to a particular country would never be tortured. See United Nations press release, 8 May 2007, "Committee against Torture hears response of the Netherlands".

lawfulness of the deprivation of liberty and order immediate release where detention is unlawful. This implies that other minimum guarantees are applicable, such as full access to material and lawfully obtained evidence related to the detention, to ensure that review is effective.

Tools on human rights and counter-terrorism

33. OHCHR is developing a number of tools on countering terrorism with full respect for human rights, in particular a fact sheet on human rights, terrorism and counter-terrorism. The fact sheet will be addressed to State authorities, national and international non-governmental organizations, national human rights institutions, legal practitioners and other individuals concerned with ensuring the protection and promotion of human rights in the context of terrorism and counter-terrorism. Its aim will be to provide a practical tool for practitioners dealing with counter-terrorism and human rights. In March 2007, an expert consultation to discuss the fact sheet on human rights, terrorism and counter-terrorism took place. Participants included members of the former Subcommission on the Promotion and Protection of Human Rights, relevant special procedures mandate holders, United Nations agencies, regional organizations and non-governmental organizations. OHCHR is also in the process of updating the *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism* and is developing a fact sheet on the relationship between international humanitarian law and human rights law.

Other developments

34. In November 2006, OHCHR and the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights jointly organized a workshop on human rights and international cooperation in counter-terrorism, hosted by the Government of Liechtenstein. The workshop provided an opportunity for security experts and legal advisers from ministries of the interior, justice, defence and foreign affairs in various OSCE participating States, as well as human rights and international law experts, to identify and discuss international human rights obligations and commitments of OSCE participating States in the field of international cooperation in matters related to combating terrorism and to assist States in ensuring that measures taken to counter terrorism comply with their obligations under international human rights law. Specifically, the workshop focused on issues related to the transfer of individuals suspected of terrorist activity, including the principle of non-refoulement, procedural guarantees and due process in the context of transferring individuals. Participants also discussed issues related to exchange of evidence and information-sharing, as well as individual sanctions such as asset-freezing and the human rights implications of national and international listing mechanisms.

35. OHCHR also participated in a number of meetings dealing with issues related to human rights and counter-terrorism, including an expert group meeting organized by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in Berlin in November 2006 and an expert workshop entitled "Human rights challenges in the fight against terrorism: protecting the right to privacy", organized by the Office of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, on 1 June 2007.

IV. Conclusions

36. **The United Nations Global Counter-Terrorism Strategy is an important development in ensuring a coordinated and comprehensive response to terrorism at national, regional and global levels. With the support of the members of the Counter-Terrorism Implementation Task Force, including OHCHR and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Member States should continue to implement the Strategy, which considers respect for human rights and the rule of law to be the fundamental basis of the fight against terrorism. This should include a commitment to ensuring that the human rights treaties become a full component of the counter-terrorism architecture.**

37. **The United Nations human rights system continues to address the question of the protection of human rights and fundamental freedoms while countering terrorism, including by assisting Member States in ensuring that all measures taken to counter terrorism are in conformity with their obligations under international human rights, humanitarian and refugee laws.**

38. **The High Commissioner for Human Rights, human rights treaty bodies, as well as a number of special procedures mandate holders have continued to express serious concern regarding a number of measures adopted by States which continue to undermine human rights and the rule of law. These include: secret detention and the irregular transfer of individuals suspected of terrorist activities; the use of diplomatic assurances, memorandums of understanding or other transfer agreements to justify return to places where they face a real risk of torture, ill-treatment or other serious human rights violations in breach of the absolute prohibition of refoulement; the continued detention of persons suspected of acts of terrorism in the absence of a legal basis for detention and minimum due process guarantees, including the right to judicial review of detention; limitations to effective judicial scrutiny of counter-terrorism measures; and issues such as the profiling of individuals and the respect for the principle of legality when defining terrorism.**